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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~190~~ 155.

DAVID J. HODGES, ELLA M. PARKER, GERTRUDE M. HODGES, AND WILLIE E. HODGES, HEIRS-AT-LAW OF JAMES L. HODGES, APPELLANTS,

vs.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, AND MARY L. GRIFFITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED NOVEMBER 7, 1902.

(18,727.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 499.

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vs.

WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, AND MARY L. GRIFFITH.

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a UNITED STATES OF AMERICA, *ss:*

United States Supreme Court.

To William C. Colcord, Henry S. Colcord, Charles F. Colcord, and Mary L. Griffith, Greeting:

You are hereby cited and admonished to be and appear at and before the United States Supreme Court at Washington city, D. C., in thirty days next, after the service of this citation to answer an appeal taken and filed in the clerk's office of the United States Supreme Court from the supreme court of the Territory of Oklahoma, wherein David J. Hodges, Ella M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, were plaintiffs in error, and you were defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 30th day of October, in the year of our Lord one thousand nine hundred and two, and the Independence of the United States of America one hundred twenty-sixth.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER,
Clerk Sup. Ct.

The service hereof accepted this the 1st day of November, 1902.
SHARTEL, KEATON & WELLS,
Attorney for Appellee.

[Endorsed:] No. 1193 James L. Hodges *vs.* William C. Colcord *et al.* Citation. Filed Nov. 3 1902 Benj. F. Hegler, clerk supreme court. By —— ——, deputy. Ent.

1 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error, *vs.* WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. Colcord, and Mary L. Griffith, Defendants in Error.	Petition in Error.

The said James L. Hodges, plaintiff in error, complains of said defendants in error in that the said defendants in error at the September term of the district court of Oklahoma county, Territory of Oklahoma recovered a judgment by the consideration of said court

against the said James L. Hodges in a certain action then pending in said court wherein the said James L. Hodges was plaintiff and the said William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith were defendants. The original case-made, duly certified and attested is hereto attached marked "Exhibit A" and made a part of this petition in error, and the said James L. Hodges avers that there is error in said record and proceedings in this, to wit:

1st. The court erred in sustaining the demurrer to the petition.

2nd. The court erred in dismissing plaintiff's petition and action.

Wherefore the plaintiff in error prays, that said judgment so rendered may be reversed, set aside and held for naught, and that the plaintiff in error be restored to all rights he has lost by the rendition of such judgment and for such further relief as to the court may seem just.

JAMES L. HODGES,
Plaintiff in Error,
By J. S. JENKINS, *Attorney.*

Filed: Jan. 24, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

2 JAN. 22, 1902.

I hereby accept service of within petition in error and waive issuance and service of summons in error on behalf of defendants in error, and enter an appearance.

J. R. KEATON,
Att'y for Def'ts in Error.

Filed: Jan. 24, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

3 TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court in and for the County and Territory Aforesaid.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants. } Case-made.

Be it remembered, to wit, on the 1st day of June, 1901, the plaintiff, James L. Hodges, commenced his action against the defendants by filing in the district court of Oklahoma county, of that date, his petition, which is in words and figures as follows to wit:

4 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court in and for Oklahoma County, Territory Aforesaid.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants. } Petition.

The plaintiff complains of the defendants and for the cause of action herein alleges and says that he is the equitable owner of the following-described tract of land situated in Oklahoma county and Territory aforesaid, to wit: Lots 2, 3, 12, 13, 14, 15, and 18 of section 5, township 11 N. range 3 W., the same being the N. E. ¼ section 5, township 11 N., range 3 west of the Indian meridian, and he is entitled to the immediate possession of the same, and that defendants unlawfully keep him out of possession.

Plaintiff says that he is a citizen of the United States, and was a citizen of the United States at and long prior to the 22nd day of July 1889, and at all of the dates above named, he was legally qualified to make a homestead entry of said land under the laws of the United States; that in pursuance of said rights he entered and settled upon the land above described with the intent to acquire title thereto under the homestead laws of the United States, on the 22nd day of July 1889, and immediately made permanent and lasting improvements on the same as required by law to entitle him to make a homestead entry on said land; plaintiff alleges that he never entered upon or occupied any portion of the lands of the United States opened to settlement on the 22nd day of April, 1889, prior to noon of that day; that plaintiff resided on said land until the — day of ——, 189– when he was ejected by William R. Colcord, the father of the defendants. Plaintiff alleges that said William R. Colcord died on or about the 1st day of January, 1901, leaving the defendants his sole heirs.

5 Plaintiff alleges that at the time he entered upon said land, and made settlement thereon, one John Gayman had entered upon and occupied said land, that on the 25th day of April, 1889, the said John Gayman obtained a pretended homestead entry on said land, that said Gayman was disqualified from ever entering or obtaining any right or title to said land, by reason of his entering upon and occupying a portion of the Oklahoma country declared open to settlement by the President's proclamation of March 3rd, 1889, prior to 12 o'clock noon April 22, 1889, as shown by a copy of the decision of the Land Department, recorded in vol. 24, page — of the United States Land Decisions, hereto attached, marked "Exhibit A" and made a part of this petition.

In the decision above referred to the honorable Secretary of the Interior finds as facts that James L. Hodges has resided on said land since July 22d, 1889; that Runyan has resided on said land since May 13th, 1890, and William R. Colcord since 1893.

Said William R. Colcord filed his contest against the said John Gayman on the 23rd day of July, 1889, on the ground of disqualification, and the plaintiff James L. Hodges filed his contest against said John Gayman August 23rd, 1889, on the ground of prior settlement, as shown by the decision of the Hon. Secretary of the Interior dated December 1st, 1894, hereto attached marked "Exhibit B," and made a part hereof; that on the facts above stated, and the further fact found in the above decision, that John Gayman filed his relinquishment because of the said contest of the William R. Colcord, and on other facts therein found.

The honorable Secretary found as questions of law, that the said filing of the said John Gayman, as above stated, segregated the land in controversy from the public domain, and that the plaintiff acquired no rights by reason of his said settlement made on said land on the 22nd day of July, 1889, because the said settlement was subsequent to the homestead entry of said Gayman, and the hon-
6 orable Secretary further found as a presumption of law that said Gayman relinquished his said filing on said land April 12th, 1893, on account of the contest of said William R. Colcord as is shown by "Exhibit A" hereto attached as above stated.

The plaintiff alleges that the honorable Secretary of the Interior and officers of the Land Department of the United States, have misconstrued the law applicable to the facts established before said department, and thus have denied plaintiff rights which, upon a correct construction of the law, would have been conceded to him, namely, a preference right to file a homestead entry on said land, and on final proof to receive a patent to said land.

Plaintiff further states that he settled on said land in good faith, made permanent improvements on the same, and resided on said land for more than five years continuously after his settlement, as above stated. Plaintiff further states that in consequence of erroneous rulings of the officers of the Land Department, upon the law applicable to the facts found, his rights were refused him.

Plaintiff alleges that the Land Department should have found the law applicable to the facts, to be that the homestead entry of the said John Gayman was absolutely void, and that he acquired no rights by reason thereof, and that the same did not segregate said land from the public domain. James L. Hodges being the first legal settler on said land, had a preference right to file on said land; that John Gayman's said homestead entry being void, W. R. Colcord could gain no preference right to file a homestead entry on said land, because of his contest. That Gayman's relinquishment shows on its face, that it was made because of the decision in the Smith-Townsend case, and that the law could not presume that it was made because of Colcord's contest in the face of testimony to the contrary.

Plaintiff here offers to pay into court, for the benefit of the defendants, all the money that they have expended in paying the necessary fees in the land office, in obtaining a homestead filing, and
patent to said land, which plaintiff believes to be thirty-five
7 dollars, and tenders that amount.

The plaintiff alleges that he is the equitable owner of said

land and entitled to the possession of the same, and that defendants hold the naked legal title to said land, which they obtained by a misconstruction of the law, by the officers of said department; but for the misconstruction of the law as above alleged, the patent to said land would have been issued to plaintiff, and for no other reason. The plaintiff alleges that the value of the land in controversy is ten thousand dollars.

Plaintiff alleges that by reason of the misconstruction of the law applicable to the facts found in the Land Department, the patent to said land was issued to said William R. Colcord by the United States on the 13th day of June, 1899, vesting in him the naked legal title; and for no other reason. That upon the death of the said William R. Colcord, as aforesaid, the naked legal title descended to the defendants, and they are now setting up claim to said land as the sole heirs of said William R. Colcord.

Wherefore, the plaintiff prays that the defendants be cited to answer this petition, and that on a final hearing the defendants be decreed to be trustees for plaintiff, and that a resulting trust be declared in favor of the plaintiff and that the defendants be decreed to convey the legal title to said land to this plaintiff, and for all equitable relief to which he may be entitled, and for costs of suit.

(Signed) J. S. JENKINS,
Attorney for Plaintiff.

8 "EXHIBIT A."

Contest—Preference Right of Entry.

HODGES ET AL.
v.
COLCORD.

The preferred right of a successful contestant is not defeated or impaired by adverse settlement claims acquired subsequent to the entry under attack.

The right of a successful contestant accorded by section 2, act of May 14, 1880, is not dependent upon the truth of the charge as laid, if the cancellation of the entry is the result of a contest prosecuted in good faith.

Secretary Francis to the Commissioner of the General Land Office,
February 27, 1897.

(I. H. L.) (R. H. W.)

I have considered the appeals of James L. Hodges and William C. Runyon from your office decision of October 3, 1896, (on review) dismissing their contests and allowing the entry of Colcord to remain intact. This case involves lots 2, 3, 12, 13, 14, 15, and 18 of sec. 5, T. 11 N. R. 3 W. Oklahoma district, O. T.

Most of the facts as they appear in the record have been heretofore stated in departmental decisions of December 1, 1894, and April 12, 1895, in the case of Simpson and Colcord *v.* John Gayman, and

are fully set forth in your decision of October 3, 1896, from which the present appeals are taken, so that only such portions as are material to the pending issues need be here repeated.

Upon a hearing as to the land in question between Colcord and Gayman upon the charge of disqualification by reason of Gayman having entered the Territory during the prohibited period,—in which the application of Hodges to intervene was denied—the local office decided in favor of Gayman, and Colcord appealed.

On March 21, 1893, your office held that while Gayman was in the Territory at the time of opening—working for the A. T. & S. F. R. R. Co. on its right of way, he gained no advantage therefrom—
9 and affirmed *the decision below denying the application* of Hodges and dismissing the application of Colcord.

This decision came before the department for consideration upon the appeal of Colcord, the motion for review of Hodges (which was not acted on by your office) and a third contest filed by Runyon on April 13, 1893, alleging prior settlement and the disqualification of Colcord. Hodges also filed a supplementary affidavit of contest making the same charges.

While the case was pending before the Secretary, to wit, on April 12, 1893, Gayman filed his relinquishment of the tract, and Colcord made homestead entry No. 6850 of said land.

On December 1, 1894, the department having in view the rights of all parties, held that "upon the cancellation of Gayman's entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the department to do, and the case was closed," thus denying Hodge's motion for review, "but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman." The papers in the case of Runyon were returned for appropriate action.

Upon this decision, your office, on January 5, 1895, directed a hearing on the charges of Hodges and Runyon against Colcord.

Before said hearing was had, however, a motion for review of the departmental decision of December 1, 1894, was filed by Colcord, insisting that the department erred in not awarding him the preference right of entry by reason of the statement made in the relinquishment of Gayman.

Although said motion for review was denied, the department in its decision thereon of April 12, 1895, said: Gayman's relinquishment written on the back of his duplicate receipt, is in these words and figures following:

"I hereby relinquish all my right to and interest in and to the Government of the United States, and ask that my entry be cancelled of record. This relinquishment is made for the reason that my entry is voidable for the reason that I was in the Okla-
10 homa country at noon of April 22, 1889, and so held by the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend.

JOHN GAYMON.

Subscribed to and acknowledged before me this 12th day of April, 1893.

D. D. LEACH, *Register*."

It is evident by this that the relinquishment of Gaymon was induced by the contest of Colcord, and the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest. But as a hearing has been ordered upon the application of Hodges to contest Colcord's entry, no judgment will be rendered in this case in advance of such hearing. The rights of the respective parties can then be determined.

At the hearing had in the case of Hodges and Runyon against Colcord on September 20, 1895, Colcord moved to dismiss said contests, for the reason that neither of said plaintiffs alleged sufficient facts to show a superior right to that of Gaymon, the former entryman.

The evidence introduced by Hodges and Runyon showed that Hodges had resided on said land since July 22, 1889, Runyon since May 13, 1890, and Colcord since 1893, and that Colcord had paid Gaymon $650 for his relinquishment, but no evidence was introduced to show the disqualification of Colcord.

Colcord introduced no evidence but elected to stand upon his said motion to dismiss, and upon "the record affecting this tract of land."

On October 25, 1895, the local office rendered a decision recommending the dismissal of said contests, basing its action upon the opinion expressed by the department, relative to said relinquishment, and the right of a successful contestant, in its decision of April 12, 1895, (*supra*).

Upon the appeals of Hodges and Runyon your office, on April 29, reversed said local office decision and denied to Colcord the preference right to make entry of the land, holding that said
11 departmental decision of April 12, was not *res judicata* upon this point, and that whether Colcord acquired any right to said land by virtue of his contest depended upon whether the charge of disqualification against Gaymon is true. In its decision upon Colcord's motion for review (October 3, 1896) your office used this language: It is apparent that the decision of this office now sought to be reviewed, misinterpreted the decision of the Secretary, which clearly held that Gayman's relinquishment was the result of Colcord's contest, and that his right was superior to the right of any one whose settlement was not made prior to the entry of Gaymon. But independently of said decision such should have been the ruling of this office. The record shows as well as the relinquishment of Gaymon, that he was in the Territory at the hour of the opening and therefore under the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend he was clearly disqualified. It was unnecessary to introduce evidence upon this point. As Hodge and Runyon failed to show any settlement upon the tract in controversy prior to the entry of Gaymon, they could not, by a settlement

made thereafter, and while the land was covered by said entry, and subject to Colcord's contest, gain any rights by their settlement. Hence the decision of the local office dismissing the contests of Runyon and Hodges was correct, and should have been affirmed.

Your office therefore, granted the motion for review, dismissed the contests, and allowed the entry of Colcord to remain intact.

The thirty-four specifications of error, in which the judgment here complained of is assailed by the attorney for Hodges, may be generalized so as to bring the material issues in the case within the scope of these two questions:

1. Did your office err in reviewing and setting aside its decision of the 29th of April, 1896?

2. Was there any circumstance connected with the relinquishment of Gaymon, which adversely affected Colcord's right to enter the land; either as the first applicant therefor after it became subject to entry, or, as a successful contestant in the exercise of his preference right?

12 It appears to me that the claims of Hodges and Runyon rest upon no other basis than that of settlements upon land, which, at the time, was covered by the entry of Gaymon. It had been segregated from the public domain by proper official action. No one could acquire any present right to it while in this condition. A settlement upon it, with a view to the initiation of an adverse claim—if not amounting to a trespass under the doctrine of Atherton *v.* Fowler (96 U. S. 513) is certainly without any legal status (Maggie Laird, 13 L. D. 502).

There is a line of cases to which attention is called in the argument of Hodges' attorney, in apparent conflict with this doctrine, which holds that a settler on land covered by the entry of another acquires a legal status as against the Government the instant such entry is relinquished, and the right thus acquired is not defeated by the entry of a third party immediately following such relinquishment. (McGowan *v.* McCann, 15 L. D. 542; Fosgate *v.* Bell, 14 L. D., 459; Poole *v.* McLoughney, 11 L. D., 197).

In all of these cases—the settler being upon the land at the moment it became a part of the public domain and subject to entry—his right of priority was recognized as superior to that of a third party whose claim rested upon an entry subsequent to the settlement. The relinquishment had no other affect than to relieve the land from incumbrance and open up the other questions upon which the decisions turned. But in the case at bar the question is whether Gaymon's relinquishment was the result of Colcord's contest?

If this be the fact Colcord had a preference right of entry which nothing could defeat except his own disqualification, or a right superior to that of Gaymon, the original entryman.

It is unnecessary to pass upon the conflicting interpretations of the departmental decision of April 12, 1895, as given in your office decisions of April 29, 1896, and October 3, 1896, respectively, further than to hold that the judgment of the department in said decision was suspended to await the issue of the hearing which had

13 been ordered upon the application of Hodges to contest Colcord's entry. Said decision however, did express a very de-

ided opinion "that the relinquishment of Gaymon was induced by he contest of Colcord" and, also that "the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest."

This language—in view of the expressed purpose to render no inal judgment in this case—must be regarded as dicta and having o other effect than a preliminary intimation to the contestants that nless a right superior to Gaymon's was established at the hearing, he preference right of Colcord would not be effected.

As neither Hodges nor Runyon alleged actual settlement prior o Gayman's entry, and as their contests were subsequent in date of ling to the contest of Colcord, there was no error in rejecting Hodges' application to intervene in the latter.

The only issue was as to Gayman's disqualification, by reason of aving entered the Territory during the prohibited period.

Upon that issue, Simpson, who had filed the first contest, having bandoned it, Colcord, as next in order, had the right of way as gainst Hodges and Runyon. No rule is better settled than that ontests are entitled to precedence in the order of their filing at the ocal office.

The record shows that Colcord was diligent in the prosecution of is contest and that it was pending on appeal before the honorable ecretary, at the time Gayman's relinquishment was filed.

The question of Gayman's disqualification by reason of his presnce in the Territory during the prohibited period has not been assed upon by the depa tment, and it is unnecessary to pass upon now for the reason that it ceased to be an issue when he relinuished his entry.

Section 2 of the act of May 14, 1880, declares that:

In all cases where any person has contested, paid the land office ees and procured the cancellation of any pre-emption, homestead r timber-culture entry he * * * shall be allowed thirty days * * * to enter said lands.

There is nothing in the language here used which makes the preference right of the contestant depend upon the truth f the charge of disqualification of the entryman.

If the cancellation of the entry—whether by the relinquishment f the entryman or the judgment of the Land Department—was ie result of the contest, the preference right of entry inures to the ontestant by operation of law.

The authorities agree that a relinquishment filed during the endency of a contest is presumptively the result of the contest, Webb *v.* Loughrey *et al.*, 9 L. D. 440, and cases therein cited) and I nd nothing in the record to overcome this presumption in the case bar.

It is contended that it was the $650 paid by Colcord which moved aymon to make his relinquishment, and that Gaymon's statement ndorsed on his duplicate receipt) that:

This relinquishment is made for the reason that my entry is voidble, for the reason that I was in the Oklahoma country at noon of pril 22, 1889, and so held by the decision of the Supreme Court of

the United States, in the case of Smith *v.* Townsend is untruthful. The facts and circumstances of the case lead me to a different conclusion.

Gaymon had resisted Colcord's contest at the hearing before the local office, and again, when it came before your office on Colcord's appeal, and still again, when it came on further appeal before the department. In fact, Gaymon did not relax his hold upon his entry until the Supreme Court rendered its decision in the case of Smith *v.* Townsend (149 U. S. 490) a decision from the court of last resort, upon a state of facts, similar in nearly every respect, to the facts in his own case.

This decision was upon the 3rd of April, 1893, and Gaymon's relinquishment was ten days thereafter, to wit, on April 13, 1893. It would be contrary to every sound principle of deduction to conclude that Gaymon would have continued to rely upon the decisions of the local office holding him to be qualified—although affirmed by your office—in the face of a decision of the Supreme Court holding the contrary view.

I have, therefore, no doubt whatever that Gaymon's relinquishment was induced by the belief that the charge of disqualification as made in Colcord's contest would be sustained by the department, on the authority of Smith *v.* Townsend. That he should desire under such circumstances to save the cost of his improvements and of the labor he had expended upon his entry, by its relinquishment, was natural, and cannot with fairness, be assailed as fraudulent.

His offer to sell to Hodges—so far from being an indication of bad faith—is, to my mind, a proof that there was no collusion between Gaymon and Colcord. The case of Cullins *v.* Leonard (17 L. D. 412), cannot be followed in the case at bar, for the reason that Leonard's contest was in bad faith and speculative—as he had held Pentz' relinquishment in his possession during the pendency of his contest against Pentz' entry, and frequently offered the same for sale.

The conclusions reached in your office decision (on review) of October 3, 1896, are affirmed. The contests of Hodges and Runyon will be dismissed and the entry of Colcord allowed to remain intact.

"EXHIBIT B."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec.* 1, 1894.

E. W. SIMPSON & W. R. COLCORD
v.
JOHN GAYMON. } Homestead Contest, Oklahoma.

The Commissioner of the General Land Office.

SIR: I have considered the case of E. W. Simpson and William R. Colcord *v.* John Gaymon brought here on appeal of Colcord from your office decision of March 21, 1893, affirming the decision of your local officers, dismissing Colcord's contest and holding intact Gaymon's homestead entry No. 95 of the N. E. ¼ of sec. 5, T. 11 N. R. 3 W. Indian meridian, Oklahoma City land district, Oklahoma.

Said N. E. ¼ of sec. 5 is described on the township plat as lots 2, 3, 12, 13, 14, 15, and 18; irregular subdivisions caused by the meandering of the North fork of the Canadian river which runs diagonally across said quarter section.

On April 25, 1889, John Gaymon made homestead entry of said land. Many contests were initiated against said entry. The first was that of Edward W. Simpson, filed June 5, 1889. The second was that of William R. Colcord filed July 23, 1889. The third was that of James L. Hodges filed August 23, 1889. It is unnecessary to recapitulate the others.

One ground of contest was that Gaymon's entry included lands on both sides of a meandered river. On December 12, 1891, this department decided that the North fork of the Canadian river ought not to have been meandered by the surveyors; and that John Gaymon's entry aforesaid, if in all other respects legal, shall be allowed to stand as though no meander lines had ever been run along said stream (L. & R. Press Book No. 232 page 190, and the case of Hattie Tuhrer, 12 L. D. 556).

17 Other gounds of contest alleged were disqualification by reason of illegal entries into the Oklahoma country and prior legal settlement.

On July 7, 1892, the local officers ordered a hearing between Simpson, contestant, and Colcord, cross-complain-t, on the one side, and Gaymon, the entryman on the other; Colcord having charged that both Gaymon and Simpson had entered and occupied land in the Oklahoma country before 12 o'clock noon, of April 22, 1889, in violation of the law.

At the hearing Hodges applied for permission to intervene in the case and to offer proof that he had settled upon the land on July 22, 1889. His application was denied and he appealed to your office.

Then Simpson abandoned his contest, and the hearing proceeded as between Colcord and Gaymon.

On September 13, 1892, the local officers recommended that Colcord's contest be dismissed and Gaymon's homestead entry be held intact. On appeal, your office, on March 21, 1893, affirmed said decision and on April 7, 1893, Colcord appealed to this department.

On April 12, 1893, Gaymon relinquished to the United States all his right, title and interest in the premises and his entry was canceled. On the same day, April 12, 1893, Colcord made homestead entry No. 6850 of said land.

Upon the cancellation of Gaymon's entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the department to do, and this case was closed.

I concur in your office decision that the local officers did not err in rejecting Hodges' application to intervene in the pending case, under the circumstances, in the exercise of their sound discretion.

April 17, 1893, Hodges filed a motion for a review by your office of your office decision of March 21, 1893. By letter H of June 19,

1893, your office suspended action on said motion until the appeal of Colcord has been disposed of by the department.

18 Said motion was filed too late, ten days after Gaymon's appeal to this department, and five days after Gaymon's appeal to this department, and five days after the relinquishment and cancellation of his entry. It is hereby denied; but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman. With your office letter H of October 19, 1893, you transmitted sundry papers relating to a contest initiated on April 12, 1893, against Colcord's entry made on April 12, 1893, as aforesaid. Said papers are returned to your office for appropriate action.

The papers transmitted with your official letter H of July 27, 1893, are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Endorsed: No. 2918—James L. Hodges, plaintiff, *vs.* William C. Colcord *et al.*, defendants—Petition—Filed in district court, Oklahoma county, O. T. June 1, 1901—B. D. Shear, clerk, by M. McKinley.

19 And afterwards, to wit, on the 10th day of July, 1901, said defendants William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, filed their demurrer in said district court to said petition which demurrer is in words and figures as follows:

TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court.

JAMES L. HODGES, Plaintiff,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. Colcord, and Mary L. Griffith, Defendants. } Demurrer.

Come now the defendants above named and demurrer to the petition of the plaintiff filed herein upon the following grounds, to wit:

1. Said petition does not state facts sufficient to constitute a cause of action against these defendants or any of them.

2. Said petition does not state facts sufficient to authorize the court to render any judgment whatever in said pretended action except to dismiss same.

3. Said petition does not state facts sufficient to give the court jurisdiction of the subject-matter of the action or the parties thereto.

J. R. KEATON,
Attorney for Defendants.

Endorsed: No. 2918—James L. Hodges, plaintiff, *vs.* William C. Colcord, —, defendants—Demurrer—Filed July 10, 1901, B. D. Shear, clerk, by M. McKinley, deputy.

20 And afterwards on the 23 day of September, 1901, said cause came on for hearing on said demurrer, and said petition and demurrer having been read to the court and argued by counsel the court sustained said demurrer and the plaintiff refusing to amend and electing to stand on his demurrer, the court entered final judgment dismissing said cause which said final judgment is in words and figures as follows:

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

JAMES L. HODGES, Plaintiff,
vs.
C. F. COLCORD ET AL., Defendants. } Journal Entry of Judgment.

Now on this 23rd day of September, 1901, the same being one of the regular judicial days of the September, 1901, term of said court, the above-entitled action came regularly on for hearing, according to previous assignment, upon the demurrer of defendants to plaintiff's petition and the court having seen and examined said petition and demurrer and having heard the arguments of counsel, both for plaintiff and defendants and being fully advised in the premises finds that said demurrer should be sustained.

It is therefore considered and ordered that the said demurrer of defendants to plaintiff's petition be and the same hereby is sustained, thereupon counsel for plaintiff elect to stand upon said petition and decline to amend same, whereupon it is further considered, ordered and adjudged that said petition and action be and the same hereby are dismissed at plaintiff's cost taxed at $——.

Thereafter and on the same date counsel for plaintiff ask an extension of time of sixty days within which to prepare and serve a case-made for the supreme court of Oklahoma Territory, which is by this court granted and defendants are allowed ten days thereafter within which to suggest amendments to said case-made, the same to be settled and signed upon five days' written notice by either
21 party to the adverse party or at such time and place as counsel for said parties may agree upon.

B. F. BURWELL, *Judge.*

The foregoing contains a true and correct statement of all the pleadings, motions, orders, findings and proceedings upon which judgment was rendered.

J. S. JENKINS,
Attorney for Plaintiff.
J. R. KEATON,
Attorney for Defendants.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

I, the undersigned attorney for the defendant in the foregoing suit, certify that the foregoing case was duly served on me this the 16″ day of November, 1901, and waive notice of settlement.

J. R. KEATON,
Attorney for Defendants.

Filed Jan. 24, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth and as corrected by me, is true and correct, and contains a true, full correct and complete statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such case; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at Oklahoma city, O. T., the 12th day of Dec., 1901.

B. F. BURWELL,
Judge District Court.

Attest:
[SEAL.] B. D. SHEAR, *Clerk,*
By M. McKINLEY, *Deputy.*

Filed Jan. 24, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Filed district court Oklahoma Co., O. T., Jan. 22, 1902.
B. D. SHEAR, *Clerk,*
By M. McKINLEY, *Deputy.*

Endorsed: 1193—James L. Hodges, plaintiff, *vs.* William C. Colcord, *et al.* defendants—Case-made—Filed Jan. 24, 1902, Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

22 And afterward, to wit, at the June, 1902, term of said supreme court on the second day of September, 1902, there was filed in said supreme court, a motion to revive in name of heirs, which motion reads in words and figures as follows, to wit:

23 In the Supreme Court within and for the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLcord, C. F. Colcord, Mary L. Griffith, Defendants in Error.
} Motion to Revive in Name of Heirs.

Come now David J. Hodges, Willie E. Hodges, minor, by his next friend David J. Hodges, Ella M. Parker and Gertrude M. Hodges, heirs-at-law of James L. Hodges, and represent and show to the court that the plaintiff in error James L. Hodges died on or about the 1st day of August 1902, and that David J. Hodges, Willie E. Hodges, minor, Ella M. Parker and Gertrude M. Hodges are his children, and heirs-at-law; that the land in controversy in this suit, was the homestead of James L. Hodges at the time of his death, and that on his death his right in said land descended to his heirs above named.

Wherefore, the above-named heirs of James L. Hodges suggest to the court the death of their father, James L. Hodges, the plaintiff in error, and move this hon. court to revive this cause in the name of his said heirs.

J. S. JENKINS,
Attorney for the Heirs of James L. Hodges, Dec'd.

Aug. 30th, 1902.

We hereby accept service of the foregoing motion and consent that a proper revivor of said action be made.

SHARTEL, KEATON & WELLS,
Attorneys for Defendants in Error.

Endorsed: 1193—James L. Hodges, pl'ff in error, *vs.* William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, def'ts in error—Motion to revive cause in name of heirs of pl'ff in error.—Filed: Sept 2, 1902—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

24 And thereafter at the June, 1902, term of said supreme court, on the second day of June, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error.
} #1193.

Ordered by the court: that this cause be taken on briefs and record.

25 And afterward at the June, 1902, term of said supreme court, on the third day of September, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error. } # 1193.

And now this cause comes on for consideration by the court, upon the application for revivor in the name of the heirs of James L. Hodges, plaintiff in error, deceased, and it is now

Ordered by the court: That this cause be revived in the name of the heirs, to wit: David J. Hodges, Willie E. Hodges, minor, by his next friend David J. Hodges, Ella M. Parker, Gertrude M. Hodges heirs-at-law of the said James L. Hodges, deceased.

26 And thereafter, to wit, at the June, 1902, term of said supreme court, on the fourth day of October, 1902, the following proceeding was had in said cause, to wit:

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD ET AL., Defendants in Error. } # 1193.

And now this cause comes on for final determination by the court upon the record and briefs of both parties submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error.

Opinion by Beauchamp, J., all the justices concurring except Burwell, J., who presided in the trial of the cause below, not sitting, and Irwin, J., absent.

And said opinion is in words and figures as follows, to wit:

27 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed October 4, 1902.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants in Error. } No. 1193.

Syllabus.

1. Contest—Preference right of entry.—Where A has a homestead filing upon a tract of Government land that is subject to homestead entry, and B, while said homestead filing is intact, enters thereon and makes settlement, and one day after the settlement of B, C files a contest in the local land office, charging that A is disqualified to hold the land covered by his filing, and from obtaining title thereto under the homestead laws, by reason of having entered the Territory during

the prohibited period, and claims a preference right; and subsequently, and while said contest is pending, A relinquishes his filing to the Government, and the Land Department holds the relinquishment to be the result of the contest by C, Held, that the preference right of C is not defeated or impaired by the adverse settlement claim of B, acquired subsequent to the entry of A.

2. A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and precludes it from subsequent homestead entry or settlement until the original entry is canceled or declared forfeited; in which case the land reverts to the Government as a part of the public domain, and becomes again subject to entry under the land laws of the United States. (The rule in McMichael *v.* Murphy, *et al.*, decided this term, not officially reported, followed.)

Error from the district court of Oklahoma county.

B. F. Burwell, trial judge.

Affirmed.

J. S. Jenkins, for plaintiff in error.
Shartel, Keaton and Wells, for defendants in error.

Statement of Case.

The plaintiff sued in the district court of Oklahoma county to recover the northeast quarter of section five (5), township eleven (11) north, range three (3) west Indian meridian, upon the assumption that the defendants hold in trust for him.

The petition alleges that John Gayman entered upon the land in controversy prior to twelve o'clock noon of April 22nd, 1889, in violation of law, and the proclamation of the President opening said land to settlement; that on the 25th day of April, 1889, said John Gayman filed a homestead entry on said land; that plaintiff entered and made settlement of the land in question on the 22nd day of July, 1889; that William R. Colcord, father of the defendants herein, filed a contest against the said entry of said Gayman on the 23rd day of July, 1889, on the grounds of the disqualification of Gayman; that plaintiff, Hodges, filed a contest against the entry of Gayman, August 23rd, 1889; that on the 12th day of April, 1893, Gayman relinquished his filing to the United States, which relinquishment was written on the back of his duplicate receipt, and is as follows:

"I hereby relinquish all my right to and interest in and to the Government of the United States, and ask that my entry be cancelled of record. This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22nd, 1889, and so held by the decision of the Supreme Court of the United States in the case of Smith *v.* Townsend.

JOHN GAYMAN.

Subscribed to and acknowledged before me this 12th day of April, 1892.

D. D. LEACH, *Register*."

28 On the same day said relinquishment was filed, Colcord filed homestead entry on said land, being H. E. number 6850. The rights of the plaintiff and Colcord were determined before the Land Department in favor of Colcord, the Land Department holding that the relinquishment of Gayman was the result of the contest by Colcord, and that the settlement of Hodges was made while the entry of Gayman was intact, and that he acquired no right thereby superior to the right of Colcord, and awarded the land to Colcord. A patent was issued to Colcord, June 13, 1899; that since the settlement of plaintiff upon said land, and at the time the relinquishment of Gayman was made and filed, the plaintiff was and is residing upon said land, and that he has continued to reside upon and cultivate said land for more than five years and, having fully complied with the requirements of the homestead laws, is entitled to the patent for the same; that the Land Department erred in awarding the land to Colcord, but that the same should have been awarded to plaintiff; that William R. Colcord, deceased, and that the defendants are the heirs of William R. Colcord who are now claiming said land."

The prayer of the petition was that a trustee be declared, and the defendants be decreed to make conveyance of the land to plaintiff. A demurrer was interposed by the defendants on the grounds that the petition did not state facts sufficient to constitute a cause of action, which, upon consideration, was sustained by the trial court. The suit was thereupon dismissed, and judgment for costs rendered against plaintiff. The plaintiff brings the case here upon petition in error for review.

Opinion of the court by BEAUCHAMP, *J.*:

The issue which arises is this: Did the court below err in deciding that the petition of the plaintiff did not state a cause of action? And the only question raised by the briefs in this case is, whether a party can acquire, by settlement upon a tract of Government land, covered by a homestead filing of a person who is disqualified under the act of Congress opening the land to settlement from making an entry thereto, a right superior to that of one who, on the following day, contests the entry upon the grounds of disqualification of the entryman, and succeeds, by reason of the contest, in having the entry cancelled?

The plaintiff contends that the filing of Gayman was void, therefore did not segregate the land in controversy from the public domain; that Gayman had no rights to the land, and that Colcord could gain no rights by reason of his contest; that the land remained a part of the public domain until the 22nd day of July, 1889, when plaintiff, Hodges, made settlement thereon, but that the contest of Colcord instituted one day after Hodges' settlement gave him no rights, and that, therefore, the Secretary of the Interior erred in awarding the land to Colcord, and holding that the plaintiff acquired

no rights by reason of his settlement made on the 22nd day of July, 1889, and that the relinquishment filed by Gayman, while the contest of Colcord was still pending, and the same being the result of Colcord's contest, entitled Colcord to a preference right to file upon and acquire title to said land.

A homestead filing can only be allowed when the applicant shall file with the proper officials an affidavit covering the requirements of the acts of Congress entitling him to make such filing, including the necessary allegations of qualification; upon said affidavit being duly made and filed, and found to be sufficient by the proper authorities, the filing will be allowed, entitling the applicant to enter upon, occupy and, by fully complying with the requirements of the law, obtain title to public lands.

When a filing is allowed, the land covered thereby is segregated from the public domain; the entryman, until such filing is cancelled by the proper authorities, is entitled to the possession, and required to reside upon and cultivate to acquire title thereto. If the affidavit required is false, or the applicant mistaken as to his qualifications as alleged, and, in fact, he is disqualified, then, under such circumstances, his filing is voidable, and may be cancelled upon the proper proceeding before the proper authority, and the land reverts to the public domain. It is necessary, however, before an entry or filing can be cancelled, that the applicant shall be granted a hearing before the proper tribunal, and that authority shall first have judicially determined the facts which render the filing subject to cancellation. And in order to better guard against the abuses of the provisions of the homestead law, and that title to the public domain shall not be acquired by fraud, it is provided by the statute that any per-
29 son may institute contest for any of the reasons that would render such filing voidable. Section two of the act of May 14, 1880, provides—"That in all cases where any person has contested, paid the Land Office fees and procured the cancellation of any preemption, homestead or timber-culture entry, he shall be allowed thirty days to enter said land.

The filing of Gayman being regular and valid upon its face, and until cancelled in a proper proceeding, and by the proper authority, segregated the land from the public domain. Therefore, the settlement of Hodges could avail him nothing until the filing of Gayman was cancelled, and the only way to cancel Gayman's entry was by proper and authorized proceedings. Colcord instituted that proceeding before the proper tribunal, and succeeded in securing the cancellation of the fraudulent entry of Gayman, and was, under the provisions of the act before referred to, entitled to the preference, and, if taken advantage of within the time limited, the filing, and by compliance with the law, the title. Colcord did all that was required of him to entitle him to all these benefits. The filing of Gayman was cancelled through and under the proceedings instituted and prosecuted by Colcord; and he should have the reward guaranteed him by the statute.

Counsel for plaintiff in error contends that a filing under the circumstances of this case is void; therefore, being void, a contest of

the filing could give to the contestant no rights, and, being void, did not segregate the land from the public domain, therefore, was open to settlement or entry by the person qualified to make such settlement and entry. That the filing is void, he cites Calhoun *v.* Violet, 173 U. S. Supreme Court Report, page 60, and Patterson *v.* Wilson, 65 Pacific Reporter, 92.

It is true that in the case of Calhoun against Violet, *supra*, in the opinion delivered by White, justice, the following language appears: "Where the fact that the plaintiff had entered the Territory prior to the time fixed by the statute, and the proclamation of the President, having been conclusively determined, it follows inevitably, and is the legal result, that an entry to land made under such circumstances was void, and that the ruling of the Land Department, so holding, was correct." That in the case of Patterson *v.* Wilson, *supra*, by this court, in the opinion delivered by Hainer, justice, the language last above quoted is quoted with approval. Both are opinions and decisions rendered upon the question of the rights of litigants in a case wherein it was claimed by the one party, and held by the Land Department, that the facts and circumstances proved and determined in the case justified the conclusion that under such circumstances the entry and filings were void.

A judgment may be obtained against the defendant in the court having jurisdiction of the subject-matter, upon a return of the proper officer showing due service. The facts may be that no service was had whatever. Therefore, under such circumstances, the judgment so rendered is voidable; but being regular upon its face, under many statutes, would cloud the title of the defendant to real property, and that, until by a proper proceeding in a proper court, the facts rendering such judgment void are shown to exist and the judgment vacated.

In case an entryman has secured a fraudulent entry upon the public lands by making the necessary affidavits, and unless the matter is called to the attention of the proper authorities in an authorized proceeding, the applicant may eventually acquire title to the tract of land in controversy covered by such fraudulent and voidable entry, and convey the same to an innocent purchaser, thereby displace the land covered from the public domain forever. And for this reason the statute above quoted was enacted.

It is contended that because Hodges was actually upon the land as a settler at the time Gayman filed his relinquishment, that his right attached between the time of the relinquishment and the filing by Colcord. This would be true if it were not for the fact that Colcord was a contestant for the land, and by virtue thereof was entitled to the preference right of entry.

Now, many cases may be found decided by the Interior Department, wherein it is held that the rights of a settler upon Government land attach at the instant the entry upon the land is cancelled, and as between parties upon land covered by an entry it may be said that the first settler, in point of time, will be entitled to enter such land.

30 We are of the opinion that under the law the doctrine will be affirmed that a settlement made and covered by an existing entry confers no superior, or any right whatever as against the contestant where such entry is cancelled as a result of a contest for a preference right. If this were not true, the very purpose for which the law was passed, which gives to the successful contestant a preferred right of entry, would be defeated.

The law, in our judgment, contemplates that persons who go to the trouble and expense of successfully contesting an entry, shall enjoy the fruits of their victory. The Land Department, by its decision, a copy of which is attached to plaintiff's petition, found from the evidence before them that the relinquishment of Gayman was the result of the contest of Colcord, and awarded the land to Colcord. In this we find no error. Upon the facts and under the circumstances found by the Land Department the conclusions of law were correct.—Sproat *v.* Durland, 2nd Oklahoma, page 24.

The judgment of the trial court, sustaining the demurrer and dismissing the action with costs to the plaintiff, was right, and must, therefore, be affirmed, with costs to plaintiff in error.

Burwell, justice, having presided in the court below, not sitting; all the other justices concurring, except Irwin, J., absent.

31 And on the 22nd day of October, 1902, said appellants filed in the supreme court of Oklahoma Territory their petition for appeal to the Supreme Court of the United States, together with affidavits of amount in controversy, and assignment of errors; which said petition, affidavits and assignment of errors read in words and figures as follows, to wit:

32 TERRITORY OF OKLAHOMA:

In the Supreme Court of said Territory.

JAMES L. HODGES, Plaintiff in Error, vs. WILLIAM C. COLCORD, HENRY S. COLCORD, Charles F. Colcord, & Mary L. Griffith, Defendants in Error.	Petition in Equity.

The above-named appellants, David J. Hodges, Ella M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, conceiving themselves aggrieved by the judgments, orders, and decrees made and entered in the above-entitled cause, by the supreme court of the Territory of Oklahoma, for the reasons specified in the assignments of errors filed and the assignment of errors filed herewith, and for the further reason that the value of the land in controversy is $20,000 as shown by affidavit hereto attached, prays that they may be allowed an appeal to the Supreme Court of the United States, and that a transcript of the record and proceedings and exhibits upon which said orders, judg-

ments and decrees were made and duly authenticated, may be certified to the Supreme Court of the United States, D. C.

J. S. JENKINS,
Attorneys for Appellants.

Endorsed: 1193—James L. Hodges, appellant, *vs.* William C. Colcord, Henry S. Colcord, Charles F. Colcord, Mary L. Griffith, appellees—Petition for appeal—Filed Oct. 22, 1902—Benj. F. Hegler, clerk supreme court.

33 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHAS. F. Colcord, & Mary L. Griffith, Defendants in Error. } Affidavit.

Personally appeared before me W. H. Clutter, who being duly sworn on his oath says: That he is well acquainted with the value of the northeast quarter of sec. 5, twp. eleven (11) north, range three (3) W. I. M., situated in Oklahoma county, Territory of Oklahoma, and that said land is of the value of $20,000.00 dollars.

W. H. CLUTTER.

Subscribed and sworn to before me this 21st day of October, 1902.

CHARLES EDWARD JOHNSON,
[SEAL.] *Notary Public.*

My commission expires Sep. 15, 1906.

Endorsed: James L. Hodges *vs.* William C. Colcord *et al.*,—Affidavit as to amount in controversy—Filed Oct. 22, 1902—Benj. F. Hegler, clerk supreme court.

34 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHAS. F. Colcord, & Mary L. Griffith, Defendants in Error. } Affidavit.

Personally appeared before me Will H. Clark who being duly sworn on his oath says; That he is well acquainted with the value of the northeast quarter of sec. 5, twp. eleven (11) north, range three (3) W. I. M., situated in Oklahoma county, Territory of Oklahoma, and that said land is of the value of $20,000 *dollars.*

WILL H. CLARK.

Subscribed and sworn to before me this 21st day of October, 1902.

CHARLES EDWARD JOHNSON,
[SEAL.] *Notary Public.*

My commission expires Sep. 15, 1906.

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord, *et al.*,—Affidavit as to amount in controversy—Filed Oct. 22, 1902, Benj. F. Hegler, clerk supreme court.

35 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

JAMES L. HODGES, Appellants,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, Charles F. Colcord, & Mary L. Griffith, Appellees. } Assignment of Error.

And now comes the above-named appellants, David J. Hodges, Eila M. Parker, Gertrude M. Hodges and Willie E. Hodges, heirs-at-law of the appellant, James L. Hodges, and says: That in the decrees, judgments and orders made in the above-entitled cause in the supreme court of the Territory of Oklahoma, many and manifest errors have intervened to the great prejudice of the rights of the appellants and the said decrees, judgments and rulings are erroneous for the following reasons:

1st. The court erred in sustaining the demurrer interposed to the petition of appellants, and holding that said petition did not state facts sufficient to constitute cause of action.

2nd. The court erred in holding that the contest of William R. Colcord caused the relinquishment of John Gayman to be filed in the land office on the 12th day of October, 1892, and that by reason of said contest of said William R. Colcord, he was entitled to the preference right to file on said land in controversy.

3rd. The court erred in holding that the filing of John Gayman was voidable and not void, and that said filing segregated said land from the public domain and that said James L. Hodges gained no rights by reason of his settlement on said land prior to the filing of said contest by William R. Colcord.

36 4th. The court erred in holding that title of the land in controversy may be acquired by such fraudulent and voidable entry as aforesaid, thereby displacing the land covered, from public domain forever.

Wherefore plaintiffs in error pray that the judgments, decrees and orders of the supreme court of the Territory of Oklahoma be reversed, and that plaintiffs in error have such judgment as they are entitled to under the law and in equity.

J. S. JENKINS,
Attorneys for Appellants.

Endorsed: 1193—James L. Hodges, *v.* William R. Colcord, *et al.*,—Assignment of errors—Filed Oct. 22, 1902, Benj. F. Hegler, clerk supreme court.

37 And afterwards, to wit, on the 30th day of Oct. 1902, said appellants filed in the supreme court of the Territory of Okla-

homa their order allowing appeal in said cause, which order reads in words and figures as follows, to wit:

38 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Plaintiff in Error,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, C. F. COLCORD, and Mary L. Griffith, Defendants in Error. } Order.

Now, on this the 30th day of October A. D., 1902, come the plaintiffs in error, by their attorney J. S. Jenkins, and file herein, and present to the court, their petition and assignment of errors, praying for an allowance of an appeal and that a transcript of the record and proceedings, duly authenticated, may be sent to the Supreme Court of the United States, and that such *order* and further proceedings may be had as may be proper in the premises. Upon proper consideration whereof, I hereby allow the appeal and direct and command the clerk of this court to transmit to said Supreme Court of the United States, a true, correct, and certified transcript of the record and proceedings herein.

It is further ordered, that the plaintiff- in error shall give bond for the payment of all costs that may accrue in said proceedings or in lieu of such bond, shall deposit with the clerk of the United States Supreme Court, such sum as may be required by said clerk as security for all costs that may accrue in said action, and shall pay all costs in this court, subject to the final order taxing costs herein.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord *et al.*—Order allowing appeal. Filed Oct. 30, 1902. Benj. F. Hegler, clerk sup. ct.

39 In the Supreme Court of the Territory of Oklahoma.

JAMES L. HODGES, Appellant,
vs.
WILLIAM C. COLCORD, HENRY S. COLCORD, CHARLES F. COLCORD, and Mary L. Griffith, Appellees.

To the appellees, Wm. C. Colcord, Henry S. Colcord, Chas. F. Colcord, and Mary L. Griffith, and their attorneys of record, Shartel, Keaton & Wells:

You and each of you will take notice that the appellants, The Heirs of James L. Hodges, have filed affidavits in the supreme court of the Territory of Oklahoma, in support of their petition, for an ap-

peal to the Supreme Court of the United States, showing the value of the land in controversy to be more than $5000, you are here notified that said application and petition for an appeal to the Supreme Court of the United States will be presented to the chief justice of the Territory of Oklahoma for his allowance on or before the 30th day Oct., 1902, and you are admonished to file your affidavits controverting the value of said land in controversy, if any you desire to make.

J. S. JENKINS,
Attorney for Appellants.

Service of the above notice is hereby accepted this 27th day of Oct., 1902.

SHARTEL, KEATON & WELLS,
Attorneys for Appellees.

Filed: Oct. 29, 1902—

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: 1193—James L. Hodges *vs.* William C. Colcord, *et al.*—Notice presentation of petition for appeal—Filed Oct. 29, 1902—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

40 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of James L. Hodges, plaintiff in error, *vs.* William C. Colcord, Henry S. Colcord, C. F. Colcord and Mary L. Griffith, defendants in error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 3rd day of November, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

41 [Endorsed:] No. —. In the Supreme Court of the United States. James L. Hodges, appellant, *vs.* William C. Colcord, *et al.*, appellees. Appeal from supreme court of Territory of Oklahoma. Transcript of proceedings.

Endorsed on cover: File No. 18,727. Oklahoma Territory supreme court. Term No. 499. David J. Hodges, Ella M. Parker, Gertrude M. Hodges, & Willie E. Hodges, heirs-at-law of James L. Hodges, appellants, *vs.* William C. Colcord, Henry S. Colcord, Charles F. Colcord, and Mary L. Griffith. Filed November 7", 1902.

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